No. 96-194

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ROBOSERVE, INC.,

Petitioner,

vs.

KATO KAGAKU CO., LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals, when faced with a request in a petition for rehearing for certification by the party which invoked the federal forum, should have certified a question of law on which there were ample controlling precedents from the State's highest court solely because petitioner disagreed with the Court of Appeals' interpretation of state law.

PARTIES TO THE PROCEEDINGS

Petitioner Roboserve, Inc., a Delaware corporation, and respondent Kato Kagaku Co., Ltd., a Japanese company, were the only parties to the proceeding in the Court of Appeals. Citylink Group, Ltd., a British company, is the parent corporation of Roboserve, Inc. Roboserve, Inc., has no non-wholly-owned subsidiaries. Kato Kagaku Co., Ltd. has no parent companies or non-wholly-owned subsidiaries.

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Kato Kagaku Co., Ltd. ("Kato"), respectfully submits this brief in opposition to the petition of Roboserve, Inc. ("Roboserve") for a writ of certiorari.

RULES INVOLVED

> When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the law of that state which will control the outcome of a case pending in the federal court, this court, *sua sponte*, or on the motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

Rule 52 of the Rules of the United States Court of Appeals for the Seventh Circuit.

> When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court, such court may certify such questions of the laws of this State to this court for instructions concerning such

> questions of State law, which certificate this court, by written opinion, may answer.

Rule 20(a) of the Illinois Supreme Court Rules.

STATEMENT OF CASE

1. Petitioner Roboserve brought this action in the United States District Court, invoking its jurisdiction under 28 U.S.C. § 1332, diversity of citizenship. (Am. Complt.) The action arose from a 1986 Concession Agreement between Roboserve and Kato's predecessor as owner of the Hyatt Regency Chicago ("HRC"), pertaining to installation of 1,000 computerized in-room minibars in the west tower of the 2019-room HRC. Kato acquired the HRC in 1988 and assumed the prior owner's management agreement designating the Hyatt Corporation ("Hyatt") as the HRC's manager. App. 2a, 3a fn. 2, and 4a, X218 at 7.[1]

2. Roboserve claimed that Kato had breached the Concession Agreement and wrongfully terminated it. Roboserve also claimed that it had been defrauded out of further *Hyatt* business. App. 4a.

3. The claim of fraud was based upon the placement of 970 of a competitor's Servibars in the east tower of the HRC in the spring of 1988—after Roboserve had installed 900 Robobars in the west tower. At the time, Roboserve was hoping to secure a nationwide contract with Hyatt so it was less than insistent about enforcing its contractual right to install the remaining 100 bars. App. 3a, 23a. Roboserve was advised that the "agreement was

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1. "App." refers to petitioner's appendix. "X" refers to plaintiff-petitioner's trial exhibits and DX refers to defendant-respondent's trial exhibits.

that Servibar would be installed in one tower of the Hyatt Regency Chicago for a one-year test period only" to enable comparison of the two competing systems. According to Roboserve, Hyatt representatives also indicated orally that the winner of the test would become the preferred minibar provider for Hyatt Hotels and would "get the Hyatt business." App. 3a; X3. Initially, Roboserve was unaware that there was a seven-year lease governing the Servibars at HRC. App. 4a. There was evidence that Hyatt had an oral side agreement allowing the removal of the Servibars prior to the end of the lease. App. 52a.

4. Roboserve won the test and in 1989 began protracted negotiations with Hyatt for replacement of the Servibars at HRC and for other Hyatt business. The negotiations lasted for three years after the "test" was concluded. App. 3a, 4a. There was evidence that as early as May, 1990, Roboserve was aware of potential contractual problems with removing the Servibars (X98, 20) and evidence that Hyatt was seeking to cause the side agreement for removal of the Servibars to be honored. DX17, 2(a), X223, 224, 23. Ultimately, Hyatt gave formal notice to Roboserve declining a proposal to install 1070 additional units at HRC due to "the complications of another contractual arrangement" and the negotiations terminated. App. 4a, X32.

5. The jury awarded $7 million in damages on the fraud claim ($1 million in compensatory and $6 million in punitive damages). This was in addition to an award of $2,100,000 on the breach of contract claim (vacated by the Court of Appeals with a suggested remittitur to $1,053,784 in lieu of a new trial on damages) and $850,000 on the wrongful termination claim (remitted by the district court to $722,500). App. 4a-5a, 25a, 27a.

6. Throughout the proceedings in the district court, Kato maintained that it could not be held liable for promises of "business" at "Hyatt" hotels which Kato did not own and that the

jury was erroneously permitted to find Kato liable for actions of Hyatt which were well beyond the scope of Hyatt's agency for Kato as manager of HRC and to impose damages based upon the value of Hyatt's unfulfilled promises of business beyond the HRC, which Kato could not deliver. App. 5a, 6a-7a, 10a-11a, 53a-55a, Pretrial Order at B5, Ex. A to Kato's Renewed Motion for Judgment and Exhibits A and B thereto,

7. On the fraud count, the Court of Appeals held that Kato was "correct that it cannot be held liable for Hyatt's statements to Roboserve concerning deals at other Hyatt hotels," that the damage instruction to the jury "did not conform with Illinois law," and that the district court erred "in failing to reduce the jury's unfounded award of damages." App. 6a, 7a, and 11a.

8. Summarizing the evidence of damages attributable to the alleged fraud, the Court of Appeals stated:

> The most that has been shown is that through a misleading "contest" and "negotiations" that were designed to delay, Hyatt wasted Roboserve's time and efforts, induced it not to enforce its existing contractual right to install 100 more minibars, [2] and unjustly raised its expectations of future business and profits. However objectionable, such mistreatment does not entitle Roboserve to damages for what might have been had it actually consummated a broader agreement with Hyatt. Even if Hyatt had acted in good faith (before and after Kato came along) the negotiations still may not have resulted in the

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2. This claim was ultimately asserted and compensated under the contract counts. (App. 20a-27a).

> contracts Roboserve sought. . . .We find, therefore, that had the jury been instructed as to the proper formulation for determining compensatory damages, it would have limited its award to expenses and attorney's fees. Such an award would have amounted to *no more than $37,810*.

App. 10a-11a. (Emphasis added).

9. With respect to the award of $6 million in punitive damages for fraud, the Court of Appeals held that its review of the record did not reveal evidence of the "gross," "wanton," "outrageous" or "malicious" conduct required to impose punitive damages under Illinois law. The Court stated, "[W]hat emerges from a review of the facts is a picture of a highly competitive marketplace with sophisticated advocates on all sides jockeying for position and profit," that the record revealed "little more than simple deceit and obfuscation" which are insufficient for punitive damages under Illinois law, especially "where the plaintiff had its own stratagems, including refraining for years from enforcing its contractual rights in the hope of landing a lucrative nationwide contract." App. 33a.

10. The Court of Appeals therefore held that the district court erred in denying Kato's motion for judgment as a matter of law on the question of punitive damages. App. 35a.

11. Roboserve then petitioned the Court of Appeals for rehearing and suggested for the first time that the issue of punitive damages be submitted to the Illinois Supreme Court under Circuit Rule 52 and Illinois Supreme Court Rule 20. Its petition was denied. App. 77a.

REASONS FOR DENYING THE WRIT

There was no lack of controlling precedents in the decisions of the Illinois Supreme Court or unresolved question of state law on the issue of the propriety of punitive damages presented by this case.

Numerous decisions of the Illinois Supreme Court hold that whether punitive damages may be assessed in a particular case is a question of law. The Illinois Supreme Court has repeatedly set forth the standards for resolving this question of law.

Thus, there was no reason for the Court of Appeals for the Seventh Circuit to use the certification process permitted by the Illinois Supreme Court solely because the party which chose the federal forum disagreed with the Court of Appeals' application of state law to the case before it.

Further review of this case is not warranted "to resolve the disagreement among courts of appeal over the proper use of certification" because certification was not proper in the instant case in any event. The petition should be denied.

I.

THE ILLINOIS SUPREME COURT HAS SPOKEN REPEATEDLY ON THE QUESTION PRESENTED TO THE COURT OF APPEALS.

In this case, as the Court of Appeals stated, "what emerges from a review of the facts is a picture of a highly competitive marketplace with sophisticated advocates on all sides jockeying for position and profit" where "the plaintiff had its own stratagems, including refraining for years from enforcing its contractual rights in the hope of landing a lucrative nationwide

contract." App. 33a. With a record which demonstrated "little more than simple deceit and obfuscation" and which did not reveal evidence of " 'gross,' 'wanton,' or 'malicious' conduct on the part of Hyatt or Kato" (App. 33a), the Court of Appeals held, as a matter of law, that "the district court erred in denying Kato's motion for judgment as a matter of law on the question of punitive damages." App. 35a.

In so doing, the Court of Appeals acted in accord with the controlling precedents of the Illinois Supreme Court, which has repeatedly stated that "punitive damages are not favored." *See, e.g., Loitz v. Remington Arms Co., Inc.*, 138 Ill. 2d 404, 563 N.E. 2d 397, 401 (1990) (citing prior cases). "Whether punitive damages may be assessed in a particular case is properly a question of law." *Knierim v. Izzo*, 22 Ill. 2d 73, 87, 174 N.E. 2d 157 (1961). *Accord, J.J. Case Co. v. McCartin-McAuliffe Plumbing and Heating, Inc.*, 118 Ill. 2d 447, 516 N.E. 2d 260, 263 (1987); *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 454 N.E. 2d 210, 219 (1983).

More than 75 years ago the Illinois Supreme Court stated:

> In ordinary cases a recovery of exemplary damages will not be allowed in an action of deceit [fraud], but such damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness and calling for the extension of the doctrine.

Laughlin v. Hopkinson, 292 Ill. 80, 89, 126 N.E. 591 (1920);

accord, Home Savings & Loan Association of Joliet v. Schneider, 108 Ill. 2d 277, 483 N.E. 2d 1225, 1228 (1985). *See also In re Estate of Wernick*, 127 Ill. 2d 61, 535 N.E. 2d 876, 886 (1989). Otherwise stated:

> "Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others." . . . In this context, willful and wanton misconduct " 'approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it.' "

Loitz v. Remington Arms Co., Inc., 138 Ill. 2d 404, 563 N.E. 2d 397, 402 (1990) (citations omitted).

Applying this law to the facts of the instant case, in which no fiduciary duty was involved, the Court of Appeals concluded that to meet the Illinois test of gross fraud or extraordinary circumstances clearly showing wanton or malicious conduct, there had to be some evidence that Kato or Hyatt intended to injure Roboserve. The Court of Appeals stated:

> What *the record* lacks is some indication that Hyatt or Kato intended to financially damage

> Roboserve. Without such evidence, the malice, wantonness or grossness that under Illinois law must characterize conduct justifying the imposition of punitive damages is absent. . . . Given the strong aversion of the Illinois courts toward punitive damages, we hold that a plaintiff seeking punitive damages *under these circumstances* must at least put forth some evidence of intent to injure; *merely withdrawing business opportunities is not enough.* . . .To hold otherwise *in this context* would impermissibly obscure the distinction between fraud and gross fraud, between conduct meriting (ordinary) compensatory damages and conduct meriting (extraordinary) punitive damages.
>
> Accordingly, since we can find no evidence of an intent to injure constituting gross misconduct or malicious behavior, we hold that the district court erred in denying Kato's motion for judgment as a matter of law on the question of punitive damages.

App. 33a-35a. (Emphasis added) (Citations omitted).

The Court of Appeals thus applied settled Illinois law to the facts of the case before it. Certification of an "unresolved question of state law" was not appropriate.

II.

CERTIFICATION IS NOT APPROPRIATE WHEN THERE IS AMPLE PRECEDENT IN THE DECISIONS OF THE HIGHEST STATE COURT.

As demonstrated above, there is no lack of controlling precedent from the Illinois Supreme Court on the question of the standards for imposing punitive damages. This case presents no question of unresolved state law. Thus, there was no occasion for the Court of Appeals to certify any question to the Illinois Supreme Court.

In *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 212 (1960), the certification process is described as a method of dealing "with the problem of authoritatively determining *unresolved* state law involved in federal litigation." (Emphasis added). Illinois Supreme Court Rule 20 allows certification from the United States Court of Appeals for the Seventh Circuit when it appears that a proceeding involves "questions as to the law of this State, which may be determinative of the said cause, *and there are no controlling precedents in the decisions of this court.*" (Emphasis added). Rule 52 of the United States Court of Appeals for the Seventh Circuit provides for certification "in accordance with the rules of" the highest court of the state involved.

Here, there are ample Illinois Supreme Court precedents on the standards of imposing punitive damages in tort cases generally, and in fraud cases. Thus, certification was not necessary.

Moreover, it is Roboserve which chose the federal forum. Professor Yonover, in an article relied upon in the Petition (Pet. at 7 n. 3), proposes that with narrow exceptions not involved

here, certification should be denied to the party "who has invoked federal subject matter jurisdiction and thereby evidenced willingness to be in federal court in the first place . . . That party's position is not unlike that of the child who murdered her parents and then threw herself on the mercy of the court seeking leniency as an orphan." Yonover, "A Kinder, Gentle *Erie*: Reining in the Use of Certification," 47 Ark. L. Rev. 305, 312, 317 and 328-331 (1994). *See also Stamp v. Insurance Co. of North America*, 908 F.2d 1375, 1379 (7th Cir. 1990) ("Why should a state official invoke federal jurisdiction, only to turn around and ask us to obtain the state court's opinion?").

Any suggestion that the Seventh Circuit's posture on certification is unique is belied by the source cited. Pet. at 8 n. 4 citing Yonover, "Ascertaining State Law: The Continuing *Erie* Dilemma," 38 DePaul L. Rev. 1, 20 (1989). Professor Yonover states, "The Seventh Circuit's general reluctance to certify has been echoed by other courts." *Id.* and fn. 118, citing cases from the Fourth and Fifth Circuits and a law review article noting that the Florida Supreme Court's enormous caseload and resulting delays in the certification process has made the Fifth Circuit reluctant to certify. The same article makes reference to the Illinois Supreme Court's refusal to answer a certified question. *Id.* at 21-22. *But see Collins Co., Ltd., v. Carboline Company*, 837 F.2d 299 (7th Cir. 1988) (question certified), 125 Ill. 2d 498, 532 N.E. 2d 834 (1988) (question answered), 864 F.2d 560 (7th Cir. 1989) (opinion conformed to answer). In addition, as of 1994, such populous states as California, Pennsylvania, and New Jersey had not yet adopted certification procedures, perhaps due to "the relatively large number of federal district court filings and an unwillingness to add to already overburdened state supreme court dockets." Yonover, "A Kinder, Gentle *Erie*: Reining in the Use of Certification," 47 Ark. L. Rev. 305 at 322 (1994).

Finally, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), "did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." *Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943). The Seventh Circuit, with ample Illinois Supreme Court precedent on the issue before it, should not be faulted for refusing to shirk its responsibility at the instance of Roboserve which chose the federal forum for its lawsuit against Kato.

CONCLUSION

For the foregoing reasons, respondent, Kato Kagaku Co., Ltd., respectfully prays that this Court deny the petition.

Respectfully submitted,

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